porting a stolen motor vehicle in interstate commerce from Chattanooga, Tennessee, to Walker County, Georgia. In the second, it was charged that he did unlawfully, wilfully and knowingly, "receive, conceal, store, barter, sell and dispose of" a certain motor vehicle ... "knowing said vehicle to have been stolen."

The trial was had on March 25, 1968 before the Honorable Sidney O. Smith, Jr., District Judge, at Rome, Georgia.

The government, in the course of the trial, moved for a dismissal of Count One of the indictment. The jury, on March 25, 1968, returned a verdict of guilty as to Count Two.

REASONS FOR GRANTING THE WRIT

Petitioner bases his petition on two grounds:

(1) Rule 19 1(b) of the Court providing for the granting of the writ of certiorari in a trial which "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(2) That the conduct of the government in suppressing and concealing evidence is so contrary to the overriding concepts of decency and fair play which this Court has heretofore proclaimed to be integral parts of due process, that this Court's power of supervision should be exercised.

I.

It is difficult to understand how far this trial departed from the accepted and usual course of judicial proceedings, since most of this is de hors the record and was ascertained after the trial was concluded, unless the testimony of the FBI Agent Millard is carefully considered. Millard was asked:

> Q According to Exhibit #3, Mr. Millard, which you have identified and identified the numbers on, this license tag was registered to a Charles Ladd, is that correct?
>
> A That's according to the registration.
>
> Q Have you interviewed Charles Ladd?
>
> A No, I have not, *myself*. (Emphasis supplied). (Tr. p. 54 l. 16-21)

And again, during the cross-examination of Millard, the following colloquy took place:

> MR. GUTHRIE: Your Honor, please, I would like to ask at this time, if this witness made any statement that we be furnished with a copy of it.
>
> MR. HAND: Your Honor, as I previously stated, we have previously furnished the *entire file*, and will be glad to furnish it to him again. That is the —— (Emphasis supplied). (Tr. p. 57-L 3-8)

And again from the cross-examination of Agent Millard:

> Q Exhibit 3 shows that this tag was registered to Charles Ladd.
>
> A That's right.
>
> Q Is Mr. Ladd here today?

A No, sir, he is not.

Q You did locate him, did you not?

A No. *Our investigation was unable to locate him at present*. (March 25, 1968). (Emphasis supplied). (Tr. p. 59, 60, 11. 19 to 1).

On April 28, 1969, petitioner, by subsequently retained appellate counsel, filed a petition to rehear with the United States Court of Appeals for the Fifth Circuit. A copy of the petition to rehear is appended. (App. D, p. 24). Therein petitioner alleged that the FBI had located Charles Ladd some two weeks after July 29, 1967. As a result of this allegation, the Court of Appeals for the Fifth Circuit, on May 9, 1969, caused its Clerk to write a letter to Mr. F. D. Hand, Assistant United States District Attorney, at Atlanta, Georgia, a copy of which letter is made part of the Appendix requesting that this matter be explained. (App. E, p. 29).

On May 20, 1969, Allen L. Chauncey, Jr., Acting United States Attorney for the Northern District of Georgia, filed a paper entitled "APPELLEE'S RESPONSE IN COMPLIANCE WITH THE COURT'S LETTER DATED MAY 9, 1969." (A copy of this is likewise made part of the Appendix). (App. F, p. 31).

Petitioner respectfully invites the Court's attention to the evasions, equivocations and hairsplitting found in this remarkable document. The United States District Attorney phrases the question raised by petitioner as follows: "... that the government not only found Charles Ladd but questioned him concerning a license plate registered to him and found on the stolen motor vehicle involved in this action, ..." He answers the question in the following language: "1. The United States Attorney's entire file in

this action has been reviewed and nothing contained therein reveals that Charles Ladd was at any time interviewed by any agent or employee of the government *concerning the license tag registered to him and found on the stolen motor vehicle involved in this action.*" (Emphasis supplied). The language is curious and is worthy of a Metternich or a Talleyrand, but not worthy of an officer of the Court supposedly making a plain answer to the Court's plain question. Note well that this statement does not say what the Federal Bureau of Investigation's file contained.

Then the United States District Attorney goes into a chronological outline of the FBI's efforts to find Ladd. The upshot of this is that on March 13, 1968, FBI Agent Cook, of Chattanooga, did ascertain Ladd's address and telephone number in Bellflower, California, but the District Attorney says this report of March 13 was not received by him until after March 25, 1968, the date of trial, and says further, in substance, that since the government at that time had a conviction, they had no more interest in the matter and discontinued their efforts to locate and interview Ladd. This cynical and callous indifference to the guilt or innocence of the defendant is shocking.

But regardless of what was in or was not in the United States District Attorney's file on March 25, 1968, it is straining the credulity of reasonable and practical men to ask them to believe that from March 13 to March 25, Agent David J. Cook of Chattanooga, did not communicate to Agent Albert D. Millard, of Dalton, Georgia, a scant 35 miles away, that he had located Charles Ladd. It is therefore submitted that Mr. Millard's meticulously phrased answer: "*Our investigation was unable to locate him at present*", must be taken with a slightly more than one grain of salt.

To the reply of the United States Attorney to the Court's letter requesting an explanation, Petitioner filed a detailed response, a copy of which is included in the Appendix. (App. G, p. 35).

Such conduct on the part of the government as this record reveals has been repeatedly condemned by this Court. *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d, 215, 83 S. Ct. 1194 (1963); *Giles v. Maryland*, 386 U.S. 66, 87 S. Ct. 793 (1967); *Miller v. Pate*, 386 U.S. 1; *Barber v. Page*, 390 U.S. 719 and *Berger v. California*, 37 U. S. Law Week 3247.

In *Giles*, this Court said it would not condone suppression of information which might be useful to the defense.

In *Brady*, this Court said:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

The government's case against petitioner upon the trial rested upon a slender reed, the inference of guilty knowledge arising from the single fact that on July 29, 1967, petitioner's wife was driving the automobile when it was involved in an accident. There was no proof whatsoever that during the six months and nineteen days preceding the accident that anyone had ever seen the petitioner or any member of his family in possession of the automobile, hence petitioner's guilt rested precariously on the possession of the automobile on a single instance by petitioner's wife, which inference of constructive possession by petitioner was the foundation of the additional inference that petitioner possessed the requisite knowledge the automo-

bile was a stolen one. The longer the interval between the date of theft and the date on which a defendant is first shown to be in actual possession, as distinguished from mere constructive possession, the weaker the inference becomes. The weakening is accelerated in cases of constructive possession. *Wangrow v. U. S.*, 399 F.2d 106, (C.A. Minn. 1968); *U. S. v. Allegrucci*, 299 F.2d 811 (C.A. Pa. 1962). The inference would have become so feeble, the government could not have relied upon it at all, had petitioner been able to show (1) that in this interval of 6 months and 19 days the car had been registered to Charles Ladd, (2) that Charles Ladd was wanted by the Chattanooga Police Department on charges of receiving and concealing stolen property, (3) that Charles Ladd had been in Chattanooga in January, 1967, and (4) that before and at the time of the trial the government knew where Charles Ladd was and could produce him. And had the government made a full disclosure, had they told the petitioner the truth, he would have been able to show all this to the jury.

In a long line of cases, this Court has delineated certain standards of decency and fair play which must be observed by the prosecution in any trial. The late Mr. Justice Frankfurter used to characterize departures from these standards as "conduct which shocks the conscience." The conduct of the agents of the government in this case, whether they be the agents of the FBI or of the Attorney General of the United States, involves so great a departure from these fundamental guidelines of decency that it indeed shocks the conscience and calls for the intervention of this Court's power.

The gist of petitioner's complaint is evasion, suppression and equivocation by officers of the United States.

Mr. Justice Cardozo in his essay, *Law and Literature*, (Harcourt Brace & Co., 1931), says: "What a cobweb of fine-spun casuistry is dissipated in a breath by the simple statement of Lord Esher in *Ex parte Simonds*, that the Court will not suffer its own officer 'to do a shabby thing.'" We ask the Court to not permit officers of the United States to do a "shabby" thing as they have attempted to do here.

CONCLUSION

This Honorable Court should grant this petition for certiorari to review the errors of the Court of Appeals for the Fifth Circuit in affirming the conviction of the petitioner resulting from the suppression of evidence by the government in the District Court, doing so particularly in the exercise of this Court's exercise of the power of supervision of the conduct of the officers of the court.

Respectfully submitted,

H. H. GEARINGER
Suite 101 Professional Building,
Chattanooga, Tennessee 37402,

Attorney for Petitioner.

GEARINGER AND VINEYARD

Of Counsel

[1]

APPENDIX A

In The
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

NO. 26,318

DONALD LEE HALE,

versus

UNITED STATES OF AMERICA,

Appeal from the United States District Court for the Northern District of Georgia

(April 15, 1969)

Before GEWIN and GODBOLD, Circuit Judges, and CHOATE, District Judge.

GEWIN, Circuit Judge: This appeal presents for review the judgment of conviction of Donald Lee Hale who was tried before a jury in the United States District Court for

[2] the Northern District of Georgia under an indictment charging him with violation of the Dyer Act.[1] We affirm.

The principal contention urged by the appellant is that the trial court erred in denying his motion for a directed verdict of acquittal. In reviewing the propriety of the trial court's denial, we must examine the evidence, taking the view of it most favorable to the Government, and determine whether a jury might reasonably accept the relevant evidence as adequate to support a conclusion of the appellant's guilt beyond a reasonable doubt.[2] Moreover, since this is a circumstantial evidence case, the inferences reasonably to be drawn from the evidence must not only be consistent with guilt but also inconsistent with every reasonable hypothesis of innocence.[3]

[3] The Government presented evidence of the following facts. Several hours before dawn on the morning of July 29, 1967, appellant Hale was called to the scene of an automobile accident in which his wife and children

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[1] The Appellant was convicted on a count charging a violation of 18 U. S. C. § 2313 (1964) which provides:

> Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

A count charging the appellant with violating 18 U. S. C. § 2312 (1964), which proscribes transporting a motor vehicle in interstate commerce knowing it to have been stolen, was dismissed by the trial court upon a motion by the Government before submission of the case to the jury.

[2] **Montoya v. United States**, 402 F. 2d 847, 850 (5th Cir. 1968); **Weaver v. United States**, 374 F. 2d 878, 881 (5th Cir. 1967); **Curtis v. United States**, 297 F. 2d 639, 640-41 (5th Cir. 1961).

[3] **Montoya v. United States**, 402 F. 2d 847, 850 (5th Cir. 1968); **Duncan v. United States**, 357 F. 2d 195, 196-97 (5th Cir. 1966); **Curtis v. United States**, 297 F. 2d 639, 641 (5th Cir. 1961); **Vick v. United States**, 216 F. 2d 228, 232 (5th Cir. 1954).

were involved. The accident occurred in Rossville, Georgia, when the late-model Chevrolet automobile driven by the appellant's wife collided with an approaching car. Following the appellant's arrival at the scene, he confronted the driver of the other car and proclaimed: "You hit *my* car head-on and hurt my family, I'm going to whip you."[4] Officer Dunn, a policeman investigating the accident, testified: "I separated them, and made them go, each on his way, and he [the appellant] asked me if it would be all right for Dobbins Wrecker to pull his car . . . ."

During this on-the-scene investigation, Officer Dunn was unaware that the Chevrolet automobile driven by the appellant's wife was stolen, but shortly thereafter he received information which prompted him to have the car pulled to the police station and held for additional investigation. Careful examination of the vehicle revealed that the plate containing the car's public serial number had been pried off the doorpost and that the motor number had been welded over. Unobscured, however, was the manufacturer's identification number, which matched, as did the automobile's general description, that of a car
[4] stolen in Chattanooga, Tennessee on January 10, 1967.[5]

Two days after the accident, Officer Patrick, a policeman on duty at the Rossville police station, received a telephone call from a person identifying himself as "Don

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[4] The witness stated that if the quoted words were not actually used, Hale used words to the same effect. The witness was positive that Hale referred to the vehicle as "my car." (Emphasis added.)

[5] The original license plate had been replaced by one registered to Charles Ladd. No evidence was presented identifying Ladd or explaining his registration of the car. The Government's brief states that the FBI was unable to locate Ladd.

Hale." The caller inquired why *his* car was still being held by the police. The following day—three days after the accident—an FBI agent called upon the appellant, informed him of his rights, and sought to question him about the car. Appellant Hale responded that the car was not his, that he had never seen it previous to the accident, that he did not know where his wife got it or why she had it, and that he did not wish to discuss the matter further. Neither the appellant nor his wife testified at the trial. The defense presented one witness, who testified to the appellant's good character.

It is well established that *unexplained possession of recently stolen property* permits a jury to infer that the possessor has knowledge that the property is stolen.[6] The appellant contends, however, that the sufficiency of the evidence against him must be determined unaided
[5] by this inference because the Government failed to prove that he was at any time in possession of the stolen automobile. Furthermore, he asserts that even if the evidence sustains a finding that he was in possession at the scene of the accident, the unexplained possession rule is, nevertheless, inapplicable because the automobile at that time was not *recently* stolen, the theft having occurred over six months prior to the accident.

The inference allowed by unexplained possession is a powerful one. It is a substitute for direct proof of guilty knowledge and courts, both trial and appellate, should proceed with extreme care in determining whether the

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6 See **Overton v. United States**, ... F.2d ... (5th Cir. 1968) [No. 25533, Dec. 30, 1968]; **Beufve v. United States**, 374 F.2d 123, 125 (5th Cir.), **cert. denied**, 389 U.S. 881 (1967); **Broom v. United States**, 342 F.2d 419 (5th Cir. 1965); **Barnes v. United States**, 341 F.2d 189, 191 (5th Cir. 1965); **Herman v. United States**, 289 F.2d 362, 367 (5th Cir. 1961); **Barfield v. United States**, 229 F.2d 936, 939 (5th Cir. 1956); **Yielding v. United States**, 173 F.2d 46, 48 (5th Cir. 1949); **Janow v. United States**, 141 F.2d

(Continued on following page)

evidence sufficiently establishes a basis for the inference. Cautious vigilance must be maintained against the employment of a naked legal principle in a factual setting which provides no reasonable basis for the principle's application.[7] On the other hand, the jury must not be *unduly* inhibited in its search for truth; it must be permitted to draw *fair* and *reasonable* inferences from creditable evidence.

The trial court charged the jury that a person who knowingly has the power and intention at a given time to exercise dominion or control over an object, although
[6] not in actual possession of it, is in constructive possession. This charge was proper and we believe that the evidence was sufficient to support a finding of constructive possession as defined.[8] The appellant's arrival at the scene of the accident was accompanied by implied claims of ownership, a threat of reprisal for the damage caused to *his* property, and an expression of concern about the removal of the wrecked vehicle. This conduct, in conjunction with a subsequent telephone inquiry—by a person who identified himself as "Don Hale"—as to why the police were holding *his* car, provided the jury with ample evidence to justify a conclusion that the appellant was in constructive possession of the automobile at the scene of the accident.[9]

(Continued from preceding page)

1017, 1018 (5th Cir. 1944); **Levi v. United States**, 71 F. 2d 353, 354 (5th Cir. 1934). See also, **McNama v. Henkel**, 226 U. S. 520, 524-25 (1913); **Dunlap v. United States**, 165 U. S. 486, 502 (1897); **Wilson v. United States**, 162 U.S. 613, 619-20 (1896).

[7] See **Barfield v. United States**, 229 F. 2d 936, 944 (5th Cir. 1956) (concurring opinion).

[8] See **Juvera v. United States**, 378 F. 2d 433, 437 (9th Cir. 1967); **Barnes v. United States**, 341 F. 2d 189, 192 n. 5 (5th Cir. 1965); **Arellanes v. United States**, 302 F. 2d 603, 608 n. 8 (9th Cir. 1962).

[9] See **Espinoza v. United States**, 317 F. 2d 275, 276 (9th Cir. 1963).

The appellant urges, however, that guilty knowledge cannot be inferred from *constructive* possession. He relies upon *United States v. Russo*,[10] in which the Third Circuit refused to permit an inference of guilty knowledge from constructive possession. The Third Circuit's holding, however, was based on facts patently different from the ones with which we deal. Russo owned a truck which contained a quantity of stolen cigarettes. The jury's finding that Russo was in possession of the cigarettes rested solely upon his ownership of the truck. The Court held, on appeal, that such constructive possession,
[7] without other evidence, could not support a finding that Russo knew that the cigarettes had been stolen. By contrast, the inference in the case *sub judice* rests upon appellant Hale's claimed ownership and intent to exercise control over the stolen product itself. Our concern is not with labels —actual or constructive —but with whether there existed such a possessory relationship as would

> give rational assurance to the feeling that in the abundant experience of mankind, the conclusion sought to be implied has the intrinsic mark of probability and reasonably convincing weight.[11]

While the lack of actual possession may weaken an inference of guilty knowledge, it does not necessarily eliminate the basis for the inference.[12]

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[10] 123 F.2d 420 (3d Cir. 1941).

[11] **Barfield v. United States**, 229 F.2d 936, 942 (5th Cir. 1956) (concurring opinion).

[12] **United States v. Casalinuovo**, 350 F.2d 207, 211 (2d Cir. 1965); **United States v. De Sisto**, 329 F.2d 929, 935 (2d Cir. 1964). See **Espinozo v. United States**, 317 F.2d 275, 276 (9th Cir. 1963); **Hernandez v. United States**, 300 F.2d 114, 116-19 (9th Cir. 1962).

The appellant's alternative contention is that his possession at the scene of the accident was not *recent*, since the theft occurred over six months before the accident. What constitutes *recent* possession is not capable of exact or precise definition; it varies with the circumstances of each case and, for these reasons, it is often said that the question is one of fact for the jury.[13] We agree with
[8] these principles. However, it is incumbent upon the trial court to determine whether there exists sufficient evidence to support a finding of recentness by the jury. "There is a certain period after which . . . it [is] very unfair to assume theft from mere possession . . . ," wrote Judges Pollock and Coleridge.[14] There is likewise a certain period after which an inference of *guilty knowledge* cannot be rationally inferred from unexplained possession. Whether this period has expired is a question for the trial court to determine before giving the case to the jury. In reaching its determination, the trial court need not be oblivious to other evidence pointing to the accused's guilt; to the contrary, it is free to judge the reasonableness of the inference in the context of all the evidence.[15] Approaching the case *sub judice* in this manner,

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[13] **United States v. Allegrucci**, 299 F. 2d 811, 815 n. 4 (3d Cir. 1962); **Chambliss v. United States**, 218 F. 154, 158 (8th Cir. 1914); see **Lee v. United States**, 363 F. 2d 469, 474-75 (8th Cir. 1966); **Christensen v. United States**, 259 F. 2d 192, 193 (D. C. Cir. 1958); **United States v. Di Carlo**, 64 F. 2d 15, 16-17 (2d Cir. 1933); **Boehm v. United States**, 271 F. 454, 457 (2d Cir. 1921).

[14] 9 Wigmore on Evidence §2513, at 422 n. 4 (3d ed. 1940).

[15] See **Boehm v. United States**, 271 F. 454, 457 (2d Cir. 1921); **Lee v. United States**, 363 F. 2d 469, 474-75 (8th Cir. 1966); (five months held sufficiently recent); **Jenkins v. United States**, 361 F. 2d 615, 618-19 (10th Cir. 1966) (six months held sufficiently recent).

we conclude that the trial court did not err in allowing the jury to infer guilty knowledge from the appellant's unexplained possession of the automobile. To be sure, the lapse of six months and nineteen days substantially weakened the inference of guilty knowledge, but when the appellant's unexplained possession is analyzed in the context of a factual setting as fraught with suspicion as the [9] one in this case, the inference is strengthened and doubt as to its reasonableness fades. Accordingly, we hold that the evidence against the appellant fairly included the inference to be drawn from unexplained possession of recently stolen property, and that the appellant's motion for a directed verdict of acquittal was properly denied.

The foregoing discussion presupposes that admissions into evidence were proper. The appellant contends, however, that the contents of the telephone call received by Officer Patrick were improperly admitted because Patrick did not recognize the caller's voice as being that of the appellant.[16] This contention is without merit. Once a prima facie case of authorship is made out by the proponent of evidence, the issue of authenticity is for the jury.[17] Officer Patrick's testimony, although only circumstantial evidence of authenticity, was sufficient to take the matter to the jury.[18]

The appellant also urges that by waiving its right to open the closing arguments to the jury, the Government waived its right to discuss the case generally and that, when it included in its final remarks discussion not limited to refuting

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[16] Officer Patrick testified that he was unfamiliar with the appellant's voice.

[17] **Espinoza v. United States**, 317 F.2d 275, 276 (9th Cir. 1963); **Carbo v. United States**, 314 F.2d 718, 743 (9th Cir. 1963).

[18] **Ibid.**

the appellant's closing argument, error prejudicial to the appellant resulted. This contention also fails. The order and extent of the argument is entirely within the dis-
[10] cretion of the trial court.[19]

Additionally, the appellant assigns as error the trial court's permitting the Government to reopen its case in order to offer evidence that the theft occurred in Tennessee, a fact inadvertently omitted in the presentation of the Government's case. To permit reopening and receipt of additional testimony omitted through mere inadvertence is within the discretion of the trial court,[20] and we find no abuse of discretion in the instant case.

We have examined each of the appellant's contentions and find them all without merit. The judgment of conviction is AFFIRMED.

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19 **Hardie v. United States**, 22 F. 2d 803 (5th Cir. 1927); **United States v. El Rancho Adolphus Prods.**, 140 F. Supp. 645, 649-50 (N.D. Pa. 1956).

20 **Simsirdag v. United States**, 315 F. 2d 230, 231 (5th Cir. 1963); **Reining v. United States**, 167 F. 2d 362, 364 (5th Cir.); **cert. denied** 335 U.S. 830, 93 L. Ed. 383 (1948).

Appendix A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
Office of the Clerk

June 13, 1969

TO ALL PARTIES LISTED BELOW

Re: No. 26318—Donald Lee Hale vs. U. S. A.

Gentlemen:

You are hereby advised that the Court has today entered an order denying the Petition ( ) for Rehearing in the above case. No opinion was rendered in connection therewith. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By /s/ Frances Wolff
Deputy Clerk

cc: Mr. H. H. Gearinger
Mr. F. D. Hand

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
Office of the Clerk

June 19, 1969

MEMORANDUM TO COUNSEL OR
PARTIES LISTED BELOW:

Re: No. 26318—Hale vs. USA

Gentlemen:

The following action has this day been taken in the above case:

( ) Motion to consolidate granted.
( ) Motion to supplement or correct record granted.
( ) Motion of ( ) for leave to file supplemental brief granted.
( ) Stipulation as to time for filing briefs has been granted.
( ) Motion for leave to file brief in excess of pages under Rule 28(g) F.R.A.P. granted.
( ) The Court's opinion has this day been rendered and a copy thereof is enclosed.
( ) Motion for leave to file petition for rehearing in excess of pages under Rule 40(b) F.R.A.P. granted.
(X) A stay of mandate has been granted to and including 7/14/69.
( ) Order enclosed has been entered.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/ [Illegible]
Deputy Clerk

/eav
cc: Mr. H. H. Gearinger
Mr. F. D. Hand

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1969

DONALD LEE HALE,

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 12, 1969.

/s/ Hugo L. Black
Chief Justice of the United States

Dated this 9th
day of July, 1969

[fol. 1]

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26,318

DONALD LEE HALE,)
Appellant)
)
Vs.)
)
UNITED STATES OF AMERICA,)
Appellee)

PETITION FOR REHEARING

May it please the Court:

Comes the appellant, Donald Lee Hale, by counsel, and respectfully moves the Court he be allowed to file this, his petition for rehearing, pursuant to Rule 40, Rules of Appellate Procedure, by means of this typewritten petition.

While it is realized that this Honorable Court treating this appeal is constrained to view the evidence in a light most favorable to the Government due to the verdict of the jury below, it is submitted that despite the proposition of law aforesaid the Court need not be so canalized in its review of the facts as to be irrevocably bound by that proposition, especially where in view of the peculiar factual situation the decision as to whether the appellant faces a con-

viction or is granted a new trial depends upon such peculiar facts and the inferences possibly drawn from them. If this Honorable Court is to be bound by a decision of a lower court jury which reached its conclusion on inferences subject to two interpretations, each one as appropriate as the other, then there would be little need for appellate review beyond the correction of legal errors patent on the face of the record.

[fol. 2] In view of what of necessity must be hereinafter said it is most earnestly suggested that the evidence upon which this Court found support for affirming the conviction is subject to as facile interpretation of appellant's innocence in keeping with the Court's statement (Opinion, p. 2) that "since this is a circumstantial evidence case, the inferences reasonably to be drawn from the evidence must not only be consistent with guilt BUT ALSO INCONSISTENT WITH *EVERY* REASONABLE HYPOTHESIS OF INNOCENCE." (Caps supplied for emphasis and italics for particular emphasis). It is, therefore, most earnestly urged that the contention of appellant that his statements made at the scene of the accident were made under excitement, inarticulation, confusion, and anger and meant only to be a means of distinguishing one of the two automobiles from the other and not as a claim of ownership.

To the contention that all appellant meant at the scene of the accident was identity, not ownership, it is plausible that since no one testified they ever saw appellant or any member of his family in possession of the automobile and that it was registered in another's name as to license tag there is nothing to support or advance the theory that by his words at the scene of the accident appellant intended to convey the claim of ownership.

As appellate counsel only, and not having tried the case to the jury, there is an aspect which troubles me as being but partially in the record bearing directly on the proof. The Court will recall that there was testimony adduced through the Government's witness F.B.I. Agent Millard (beginning R., p. 39) that the license tag on the automobile was registered to Charles Ladd (R., p. 54), and that the witness, Millard, testified he had not interviewed Charles Ladd (R., p. 54, line 21) or appellant's wife (R., p. 54, line 10). In preparation of the appeal [fol. 3] counsel learned that Charles Ladd had been interviewed and questioned by agents of the Government approximately two weeks after the accident (July 29, 1967) while in California, despite the following which appears in the transcript of the trial:

"Page 54:

"Line 15: (By Mr. Guthrie):

"Q According to Exhibit #3, Mr. Millard, which you have identified and identified the numbers on, this license tag was registered to a Charles Ladd, is that correct?

"A That's according to the registration.

"Q Have you interviewed Charles Ladd?

"A No, I have not, myself.

It has now come to the attention of Hale that the F.B.I. did find Charles Ladd approximately two weeks after the accident on July 29, 1967. At that time, as now, Ladd was living at 16229 Woodruff Street, Apt. 34, Bell Flower, California (Tel: 1-213-866-4492). Having found Ladd it is presumed the F.B.I. questioned him regarding the

license tag on the automobile. The above setout testimony not only resulted in misleading the court, the jury, and Hale, but created the false impression that the Government had not been able to find Ladd and that perhaps he was but a fiction and creation of the defendant, Donald Lee Hale.

Having utilized the nation-wide facilities of the F.B.I. to find Ladd and question him, and after indirectly by means of equivocation and omission (surely Agent Millard knew that a fellow F.B.I. agent had found, questioned and reported on Ladd) left the impression Ladd could not be found, the Government then secreted and suppressed this information. The presumption in law is that what the Government learned from questioning Ladd was adverse to its case against Hale, otherwise the Government would have called Ladd as a witness. The importance [fol. 4] of this Government unproduced evidence is at once apparent as is its value to Hale, since Ladd's evidence, coupled with the Georgia auto license tag in Ladd's name, would have corroborated Ladd's ownership of the automobile and would have supported Hale's disclaimer.

If the Government knew what Ladd said when questioned in California prior to the trial and then not only did not produce him upon the trial but by subtle and evasive equivocation gave the impression he could not be found it wronged Hale in two ways:

(1) It gave the Court and the jury the purposefully posed inference there was no Charles Ladd and that such a named person was a figment of Hale's imagination; and

(2) It denied Hale his right to confrontation, and the benefit of the material information gathered by the Government. *Barber v. Page*, 390 U.S. 719 (1968), and *Berger v. California*, 37 U.S. Law Week 3247 (Jan. 14, 1969).

It is respectfully submitted that perhaps the agents of the Government failed to communicate their finding and questioning of Ladd to the able Assistant U. S. Attorney in this case.

Therefore, in order to achieve the end which must in all cases be the goal in criminal prosecutions this petition to rehear should be granted, the case remanded for an evidentiary hearing, and disposed of at the trial court level.

H. H. GEARINGER
Attorney for Donald Lee Hale

Date: April 28, 1969

[fol. 5] CERTIFICATE

I certify that on the date shown below I placed in the U. S. mail service at Chattanooga, Tennessee, postage prepaid, a true and exact copy of the foregoing Petition for Rehearing, addressed to the Office of the United States Attorney, Atlanta, Georgia.

Date: April 28, 1969.

H. H. GEARINGER

Gearinger and Vineyard
Suite 101 Professional Bldg.
Chattanooga, Tennessee 37402
Tel: 615-267-9781

APPENDIX E

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
Office of the Clerk

May 9, 1969

Mr. F. D. Hand
Asst. U. S. Attorney
P. O. Box 912
Atlanta, Ga. 30301

Dear Sir:

No. 26318—Donald Lee Hale v. U.S.A.

This letter is written to you at the request of the Court in the above captioned case. The Court is concerned about certain assertions made by the appellant in his memorandum in support of his petition for rehearing which appear to be in conflict with testimony given by a government witness and with assertions made by the government in its brief. This conflict relates to a person by the name of Charles Ladd in whose name the alleged stolen automobile is said to have been registered. The Court would like an explanation from government counsel.

In his memorandum the appellant asserts that the government not only found Charles Ladd but that it questioned him regarding the alleged stolen automobile.

If the foregoing be true, it is difficult to understand how the government could assert on page 3 of its brief the following: "The FBI was unable to locate Mr. Ladd."

Moreover, on Page 59 of the record, appendix page 63, FBI Agent Millard stated unequivocally as follows:

Q You did locate him did you not?

A No, our investigation was unable to locate him at present. (This question related to the whereabouts of Mr. Ladd).

In addition, counsel for the government assured defense trial counsel that defense counsel had been furnished the government's "entire file." If it is true as asserted by Mr. Hale, in his memorandum, that Ladd had been located and interrogated, it seems likely that the file would have revealed such fact.

The Court has requested that you make response within ten days. The response may be typewritten, four copies should be filed with the Court and one copy forwarded to appeal counsel for the appellant.

Very truly yours,

/s/ EDWARD W. WADSWORTH
CLERK

EWW:adg

cc: Mr. H. H. Gearinger

[fol. 1]

APPENDIX F

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26,318

DONALD LEE HALE,
Appellant

versus

UNITED STATES OF AMERICA,
Appellee

ON APPELLANT'S PETITION FOR REHEARING

APPELLEE'S RESPONSE IN COMPLIANCE
WITH THE COURT'S LETTER DATED
MAY 9, 1969

Now comes the United States of America, Appellee, by and through counsel and, in compliance with this Court's request by letter dated May 9, 1969, submits the following response to Appellant's assertion in his petition for re-

hearing that the government not only found Charles Ladd but questioned him concerning a license plate registered to him and found on the stolen motor vehicle involved in this action, showing to the Court the following facts:

1. The United States Attorney's entire file in this action has been reviewed and nothing contained [fol. 2] therein reveals that Charles Ladd was at any time interviewed by any agent or employee of the government concerning the license tag registered to him and found on the stolen motor vehicle involved in this action.

2. The United States Attorney's file in this action contains a report of FBI Agent Albert D. Millard dated March 29, 1968, received in the United States Attorney's office on April 2, 1968, which reveals that FBI Agent David J. Cook, Chattanooga, Tennessee attempted to locate Charles Ladd at 5403 Shauff, Chattanooga, Tennessee on February 9, February 12, and February 14, 1968, but was unsuccessful; however, on February 14, 1968, Agent Cook did locate Mrs. Beulah Ladd, mother of Charles Ladd, at this address and was advised that she had not heard from her son in about six months. On March 1, 1968, Agent Cook again attempted to contact Mrs. Ladd but was unsuccessful. On March 13, 1968, Agent Cook contacted Mrs. Ladd at 5403 Shauff, Chattanooga, Tennessee and she advised that her son Charles Ladd had been in California since April or May of 1967 working in an oil field and was residing at 16229 Woodruff, Apartment 61, Bellflower, California. Mrs. Ladd advised Agent Cook that she had talked to her son by telephone Number 866-4492, since she was first contacted by Agent Cook and her son advised that the license plate in question had been on a 1948 Ford that he had traded to one Vance Dobbins before he left to go to

California. She stated that her son told her to give his address to the FBI if any further information was required in this matter. On Thursday, March 14, 1968, Agent Cook attempted to locate Vance Dobbins but was unsuccessful.

[fol. 3] 3. The above report was not contained in the United States Attorney's file at the time defense trial counsel was furnished the file for review inasmuch as it was not received until after Appellant's trial on March 25, 1968.

4. The FBI Agent in charge of the investigation in this action, Agent Albert D. Millard, has advised that Charles Ladd was interviewed concerning the license tag registered to him and found on the vehicle in question prior to Appellant's trial on March 25, 1968, and that following Appellant's trial efforts to locate and interview Ladd concerning this were discontinued.

For the foregoing reasons the government respectfully asks this Court to deny the Appellant's petition for a rehearing.

Respectfully submitted,

/s/ ALLEN L. CHANCEY, JR.
Acting United States Attorney
Northern District of Georgia

CERTIFICATE OF SERVICE

I, Allen L. Chancey, Jr., of counsel for the United States of America, Appellee, certify that I have this day served a copy of the above and foregoing response for Appellee on Attorney for Appellant by mailing same to him

in a duly franked envelope, addressed as follows: Mr. H. H. Gearinger, Gearinger and Vineyard, Suite 101 Professional Building, Chattanooga, Tennessee 37402.

This 20th day of May, 1969.

/s/ ALLEN L. CHANCEY, JR.
Acting United States Attorney

[fol. 1]

APPENDIX G

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26,318

DONALD LEE HALE, Appellant
Vs
UNITED STATES OF AMERICA, Appellee

APPELLANT'S REPLY TO APPELLEE'S RESPONSE TO COURT'S LETTER DATED MAY 9, 1969 ON APPELLANT'S PETITION FOR REHEARING

Appellant's petition to rehear raised certain questions regarding the Government's investigation of the license tag found on the automobile at the time of the accident, which tag was shown by the Government to have been issued to and registered in the name of Charles Ladd. (Tr., p. 54; A., p. 54).

As a result of the issues raised by appellant in his petition to rehear, the Court wrote to the U. S. Attorney on May 9, 1969. To that letter the Government has responded under date of May 20, 1969.

The Government's response does not meet the assertions of the appellant. Before the facts can be fully appreciated, certain undisputed assumptions must be accepted. First, it must be assumed that the Federal Bureau of Investigation did, in this case as it reportedly always does, inquire of and cooperate with local
[fol. 2] police authorities, investigate all sources of information, and, moreover, in this case not unlike all cases, maintain excellent internal communications between agents and district offices. Second, that as is its custom, it acted with dispatch and that no dilatory investigation occurred. Third, that not being a geographically localized organization it had the interlocking services and cooperation of all of its offices spread over the entire country, including California. Fourth, being primarily an investigatory and reporting agency, it normally could be assumed its agents did their duty, and having done that duty, dutifully reported to the officers of the Government charged with acting on such investigation; however, in this fourth assumption it appears the appellant's reliance on such assumption was ill-advised all as will be hereinafter shown, particularly in the light of the Court's pointed inquiries in its letter of May 9, 1969 as to page 59 of the record and page 63 of the appendix where Agent Millard testified that as of the date of the trial, March 25, 1968 the F.B.I. had been unable to find Charles Ladd, which statement probably led the Assistant U. S. Attorney to say in his brief, "The F.B.I. was unable to locate Mr. Ladd." (Government's Brief, p. 3, and slip opinion, page 4, footnote 5).

Again, as will be hereinafter shown, there is something highly questionable in the chronology. Agent Millard questioned Hale on August 1, 1967 (Tr., pp. 39 and 44, A.,

pp. 45 and 50) which was three days after the accident on July 29, 1967. Hale was arrested in September, 1967. The trial was had on March 25, 1968. Hale has learned that Charles Ladd made a person-to-person telephone call in September, 1967 from California to Mr. Vance [fol. 3] A. Dobbins, Jr., Chattanooga, Tennessee, regarding Tennessee license tag, 1967 JS7605, and Hale's difficulties. Hale is advised that Mr. Dobbins concluded by the peculiar form of questions posed by Charles Ladd in the telephone conversation that someone was with Ladd prompting and listening to the conversation, whereupon Dobbins said nothing more than that his garage had been asked to pull in the wrecked automobile.

Turning now to the Government's response dated May 20, 1969. In paragraph No. 1, the assertion is made by the Honorable United States Attorney that as of the present there is nothing in the Government's file as of May 20, 1969, which indicates "* * * that Charles Ladd was at any time interviewed by any agent or employee of the government" concerning the license tag registered to him and found on the stolen motor vehicle involved here. There is a patent inconsistency in such statement and the acknowledgement in the subsequent paragraphs of the response where it is admitted that three days after the trial, Agent Millard made a report dated Friday, March 29, 1968, which was received by the U. S. Attorney's office on Tuesday, April 2, 1968, which stated that Agent Cook sought to find Charles Ladd on Friday, February 9, Monday, February 12 and Wednesday, February 14, 1968 (all prior to the trial on March 25, 1968) at 5403 Shauff Street, Chattanooga, Tennessee, but could not find him. Millard's report then states that on Wednesday, February 14, 1968 (still more than one month before the trial on March 25, 1968) Agent Cook talked with Charles Ladd's mother. Later, on Friday, March 1, 1968 (25 days before the trial) Agent Cook again tried to

talk with Charles Ladd's mother but could not find her.

Still later, on Wednesday, March 13, 1968 (12
[fol. 4] days before the trial on March 25, 1968) Agent Cook found Charles Ladd's mother who then told him Charles Ladd was in California where his address was 16229 Woodruff, Apartment 61, Bellflower, California, (the specific address stated in the Petition to Rehear) where the telephone number was 866-4492.[1]

So far as Hale knows, this may have been the first the F.B.I. learned the whereabouts of Charles Ladd; however, it is clearly admitted by the Government, the F.B.I. got this specific information from Ladd's mother before the trial on March 25, 1968 which renders Agent Millard's statement under oath highly questionable. Thereafter, as recounted in the Government's response, only one attempt was ever made by the F.B.I. to locate and talk with Mr. Vance Dobbins, namely, Thursday, March 14, 1968, 11 days before the trial on March 25, 1968. This abbreviated and single attempt to locate Mr. Dobbins is itself suspect since Mr. Dobbins operated then, as he does now, a well-known garage and wrecker service at 2719 Dodds Avenue, Chattanooga, Tennessee, which business is listed in the white pages of the telephone book and also in the yellow pages as advertising, listing both business and home telephone numbers.

It is peculiar that Agent Millard's report was dated Friday, March 29, 1968, almost immediately after the trial on March 25, 1968. This is especially peculiar when it is realized that he unquestionably was in
[fol. 5] consultation with the U. S. Attorney prior to testifying at the trial and that either purposefully or

[1] The Bell Telephone Company confirms that this number is the Norwalk Exchange in Los Angeles and includes Bellflower, California.

for some purposeful reason did not communicate the substance of his already learned information regarding Agent Cook's investigation and the already learned exact whereabouts of Charles Ladd.

An alternative is equally possible—Agent Millard could have informed the attorneys for the Government who, for some reason did not choose to make the information a part of the case. The former is more likely, although improbable under good preparation procedures for trial. Prosecutors and defense attorneys almost always know what their witnesses will testify.

The report of Agent Millard, dated March 29, 1968 seems to conveniently have reached the office of the U. S. Attorney too late, for some reason. There seems no reasonable excuse for Agent Millard's testimony on March 25, 1968 that, as the Court points out in its letter of May 9, 1969, "our investigation was unable to locate him [Charles Ladd] at present.", but does seem to reflect a carefully studied answer such as is found on page 54 at line 10 of the transcript of testimony, to-wit:

"Q Have you interviewed Charles Ladd?

"A No, I have not, myself."

nor, assuming proper pre-trial preparation, including detailed conferences with Agent Millard as a witness, that the Government could say in its Brief, dated as late as October, 1968, that "The F.B.I. was unable to locate Mr. Ladd.", especially since the Brief was admittedly subsequent in time to the receipt in the office of the U. S. Attorney of Agent Millard's report dated Friday, March 29, 1968, which report clearly revealed that as
[fol. 6] early as Wednesday, March 13, 1968 (before the trial) the F.B.I. did, in fact, know that Charles

Ladd resided at a specific address in California. Assuming good trial preparation by the Government, it would seem that immediately Agent Millard learned, before trial, the whereabouts of Charles Ladd, the services of other F.B.I. agents in California were utilized to find and question Ladd and report the results.

Obviously, the foregoing data regarding dates, the activities of Agents Millard and Cook, and the address and telephone number of Charles Ladd did not come to the knowledge of appellate counsel, until counsel's receipt of the Government response dated May 20, 1969, especially the record being silent as to Agent Cook, except as to the whereabouts of Charles Ladd since by dint of investigation prior to or during the prosecution of the appeal in this Honorable Court, Hale and appellate counsel learned that Susan Champion, Hale's former wife, residing at Ida Bell Lane, East Ridge, Tennessee, had received a letter from her sister, Mrs. Jackie Tucker, who then resided in Bellflower, California, near Charles Ladd, who has once again moved, leaving no forwarding address, at least as far as we can find without the assistance of the F.B.I., to the effect that Charles Ladd had told her, Mrs. Jackie Tucker, that he, Charles Ladd, had told his mother to give the F.B.I. his address and telephone number in Bellflower, California. This confirms that as early as March 13, 1968 (12 days before the trial on March 25, 1968) Charles Ladd's mother did give his address and telephone number to Agent Cook, as recounted in Agent Millard's report dated March 29, 1968.

[fol. 7] Our present investigation has revealed that Charles Ladd is wanted at Chattanooga, Tennessee on a warrant for receiving and concealing stolen property. If this is so, and it will be confirmed by inquiries

at the office of the Sheriff of Hamilton County, Chattanooga, Tennessee, and furnished to the Court, then further suspicions cannot be ignored, namely, could the F.B.I. with its closely and efficiently maintained relationships with local police authorities, not have known of the fact Charles Ladd was wanted by the police at Chattanooga, Tennessee? This assumes further importance in the light of (1) the conviction achieved as to Hale, and (2) the Government's statement, paragraph 4 of its response dated May 20, 1969, that "* * * following Appellant's trial efforts to locate and interview Ladd concerning this were discontinued."

Appellant and appellate counsel know not what Charles Ladd either said to agents of the F.B.I. in California or that the F.B.I. did talk with him in California; however, from the chronology developed in this case, it is uncontroverted that the agents of the Government did know where Charles Ladd was prior to trial despite the fact that upon the trial the Government witness said under oath that they, the F.B.I. did not know where he was and seemingly and perhaps innocently led the Assistant U. S. Attorney to say in his brief that the F.B.I. was unable to locate Mr. Ladd.

Appellant's appellate counsel admits that at this posture of the case he cannot claim that Charles Ladd did talk with agents of the Government in California prior to
[fol. 8] the trial or that if they did talk with him that his testimony was beneficial to Hale; however, under the presumption well known to this Court, if the Government did have information about the whereabouts of Ladd or did have information gleaned from him by an agent in California before the trial and then did not either reveal this fact or these facts to Hale or, more importantly, to the Trial Court, then Hale is entitled to rely on the presumption that Ladd's testimony, if revealed and produced,

would have been detrimental to the Government's case against him and favorable to him. This is a denial of confrontation and a practice condemned by the Supreme Court of the United States. *Brady v. Maryland*, 373 U.S. 83; *Miller v. Pate*, 386 U.S. 1; and *Giles v. Maryland*, 386 U.S. 66; and particularly *Barber v. Page*, 390 U.S. 719, and *Berger v. California*, 37 U.S. Law Week 3247.

CONCLUSION

The inescapable result on the whole record is that at the time of Hale's trial the Government knew of evidence contradictory of its proof against Hale but suppressed it, which, alone is not only reprehensible but reversible error.

When the conviction of Hale must rest on such a minimal proof as that adduced in this circumstantial evidence case where the inference of unexplained possession of recently stolen property questionably permits a further inference of knowledge the property was stolen, and these inferences must rest on the additional inference of constructive possession, the now discovered machinations concerning the evidence regarding the registration of the vehicle's license tag in Charles Ladd, which was not only not developed by the Government, but kept from Hale and suppressed, the conviction cannot in good conscience be allowed to stand, as this Court noted in citing *Barfield v. United States*, in Footnote 7 on page 5 of the slip opinion.

[fol. 9]

RELIEF SOUGHT

In the present posture of this case, the opinion of April 15, 1969 by this Court hesitatingly affirming the conviction

should be vacated, the petition for rehearing considered and granted, and the judgment and sentence of the District Court reversed with directions to dismiss the indictment, all so that justice under law can be achieved under the admitted and recognized admonition of this Court that courts, both trial and appellate, should proceed with extreme care in determining whether the evidence sufficiently establishes a basis for the inferences, since cautious vigilance must be maintained against the employment of naked legal principles in settings, such as here, which provide no reasonable basis for the application of the principles, all with appreciation of how the inference-on-inferences sub judice when coupled with the suppression of evidence presumably exculpatory of Hale resulted in Hale's conviction.

Respectfully submitted,

H. H. GEARINGER
Attorney for Appellant Hale

CERTIFICATE

I certify that on the date shown below, I deposited in the U. S. Mail service at Chattanooga, Tennessee, with postage prepaid in an amount to assure delivery, a true and exact copy of the foregoing, addressed to the Office of the United States Attorney, Atlanta, Georgia.

Date: .....

H. H. Gearinger

APPENDIX H

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

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Appendix H

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

October Term, 1968

No. 26,318

D. C. Docket No. Cr. 5555

DONALD LEE HALE,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Georgia

Before GEWIN and GODBOLD, Circuit Judges, and CHOATE, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

April 15, 1969

Issued as Mandate:

Appendix H

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26,318

DONALD LEE HALE,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Georgia

June 13, 1969

ON PETITION FOR REHEARING

Before GEWIN and GODBOLD, Circuit Judges, and CHOATE, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.